Nos. 337, 338 & 339

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REPLY BRIEF FOR THE CHOCTAWS.

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REPLY BRIEF FOR THE CHOCTAWS.

$300,000 Consideration.

one reads the first or cession clause of the third article e treaty of 1866 the conclusion is that the $300,000 is sideration for the lands west of the 98th degree of lon- e, but the proviso shows clearly that if the Choctaws hickasaws pass certain laws, rules, and regulations for enefit of their freedmen, then the $300,000 are to be

transferred as a consideration for the grants made to the freedmen. The Choctaws have made those grants. Congress provided in the act of June 28, 1898, known as the Curtis act, that when the lands of the Choctaw and Chickasaw nations should be allotted, the Chickasaw freedmen should have forty acres each of the lands allotted to them. There are about 9,000 (Dawes Commission Records) of the Choctaw and Chickasaw freedmen, and to give to each of them forty acres of land of average value it amounts to 360,000 acres of land, to say nothing of the other benefits the freedmen have enjoyed. These latter lands and the benefits of the treaty for the freedmen are what under the proviso of the said third article of said treaty the $300,000 are to pay for. In the meantime said freedmen have been provided for in pursuance of the fourth article of said treaty of 1866.

It is not possible that this amount of money was intended to pay both for these 360,000 acres of land and other benefits east of the 98th degree of longitude and for the lands of the Leased District west of the 98th degree of longitude.

Fee of Choctaw Delegation.

As to the allusion of counsel for the United States to the act of the General Council of the Choctaw Nation of December 24, 1889, which provided a contingent fee for the prosecution of the claim of the Choctaws to an interest in the lands of the Leased District, we beg to say that all which could be brought to bear on that part of the subject was gone into fully by the Interior Department, the President, and both houses of Congress, and the court is respectfully referred to the Choctaw memorial in reply to the President's special message of February 17, 1892, Senate Report No. 552, 52d Congress, 1st session, and to the debates in Congress on the subject.

The Fifth Stipulation, Fort Smith.

Counsel for the United States insist that there is but one form of the fifth stipulation, and that is as stated in their original brief (pp. 146 and 147) and their reply brief (p. 14).

In both instances it is quoted in parallel columns with the fourth article of the unsigned treaty of 1865, and insisted that the said fifth stipulation is embodied in the said fourth article.

Said fifth stipulation reads thus:

"A portion of the lands hitherto owned and occupied by you," &c.

They overlook the meaning of the word "*hitherto.*" Its equivalent is "heretofore," "previous to this time," "in time preceding the present," and "up to this time." There was no question as to the status and occupancy of the lands east of the 98th degree of longitude, and if the said fifth stipulation had been intended to apply to the latter lands, it would have been written thus:

"A portion of the lands *now* owned and occupied by you," &c.

The status and occupancy of the lands west of the 98th degree of west longitude as fixed in articles 1, 2, 3, and 9 of the treaty of 1855 still obtained at the time the said fifth stipulation and unsigned treaty of 1865 were presented to the Choctaws and Chickasaws at Fort Smith. The United States fully intended, and the Choctaws and Chickasaws well understood, that the occupancy of the last-named lands was to be controlled by the United States for more Indians from that time.

Up to that time the Choctaws had occupied the lands west of the 98th degree of longitude. By reading the first,

second, and third articles of the treaty of 1855 together, it will be clearly seen that the United States agreed that they should be a part of "the Choctaw district," and the Choctaws continued to exercise the jurisdiction over those lands. They organized a regular district there and called it Hotub-bee district (see Choctaw constitution, District Boundaries), and the Choctaw citizens residing there were represented in the government of the Choctaw nation.

The fifth stipulation as above quoted is a recognition and admission by the commissioners of the United States that the lands which were *hitherto* owned were also *hitherto occupied*. The Choctaws, the Chickasaws, and the United States had solemnly agreed in 1855 that the lands of the Leased District, together with the lands east of the Chickasaw district, should constitute the Choctaw district. The Choctaws were then in control of those lands and continued to exercise governmental control there. It is admitted that there were no Wichita or other foreign Indians there in 1865 and 1866. The Wichitas and other small bands of Indians had been placed on those lands in 1859, but they had gone away and were not there in 1865 and 1866, and were not returned to those lands until two years after the Choctaw and Chickasaw treaty of 1866 had been made. There were no persons there to oppose or prevent Choctaw and Chickasaw settlement there. They had the fullest right to be there and they were there.

The said fourth article of the unsigned treaty refers only to the lands east of the 98th degree of west longitude.

The said fifth stipulation, further followed up, reads thus:

"A portion of the lands hitherto owned and occupied by you must be *set apart* for the friendly *tribes* in Kansas and elsewhere," &c.

The fifth stipulation was the most important of those submitted at the Fort Smith conference to the Indian tribes

owning lands in the Indian Territory. The first clause in this stipulation, "A portion of the lands hitherto owned and occupied by you," is merely descriptive. They are not of the essential importance with those which follow, "*must be set apart* for the friendly tribes now in Kansas and elsewhere." This is the language of command. It is the language of a superior to an inferior. "The lands *must be set apart*." The words are imperative, the requirement is absolute and unconditional. It is dependent on no future act, nor on the will or the wishes of any one whomsoever. The lands *must be set apart*, in compliance with the demand of the superior. There is no attempted compliance with an absolute demand of this character in the fourth article of the unsigned treaty. In that case there was simply an agreement of the Choctaws and Chickasaws to open their country to the settlement of friendly Indians from Kansas and elsewhere upon such terms *as may hereafter be agreed upon by the respective parties* and approved by the Government, but the fifth stipulation *demanded* that the lands *must be set apart* on such terms as may be agreed upon by the parties, *or such as may be fixed by the Government*.

And it is utterly impossible to find any compliance with this requirement in articles 30, 31, and 37 of the treaty of 1866. These articles are dependent on articles 11 and 12 of that treaty. Article 11 provided "that should the Choctaw and Chickasaw people, through their respective legislative councils, agree to the survey and dividing their lands on the system of the United States, the lands east of 98° shall be surveyed and laid off," &c. Now, this was entirely dependent, conditional, on the will of the Choctaw and Chickasaw legislature, and this refers to all the lands east of 98°, and no Indians were to be admitted to these lands except under these terms. We repeat, that it is utterly impossible, in the nature of things, that a compliance conditioned on the future will of the Choctaw and Chickasaw legislature should be a compliance with the absolute, imperative, and unconditional demand made in the fifth stipulation.

Again, the lands "*must* be set apart." Webster defines to *set apart* "to separate from the rest," and that is the common acceptation of the term. The lands required "must be set apart"—that is, separated from the rest of the lands—to be occupied by the Choctaws and Chickasaws as their homes. Now, the Leased District was the only land so set apart. The land east of 98°, *with the consent of the Choctaw and Chickasaw legislatures*, was to be surveyed and divided into lots on the system of the United States. The Choctaws and Chickasaws were to exercise a first selection as to these lands, and after these Kansas Indians, to a number not exceeding ten thousand, were to be admitted in and among them, becoming fellow-citizens of the Choctaws and Chickasaws, and make their selections. Now, these lands were not to be set apart—separated from the Choctaw and Chickasaw lands. These lands were to be occupied by Indians who were to dwell in and among the Choctaws and Chickasaws and were to become their fellow-citizens. The scheme of survey was never assented to by the Choctaw and Chickasaw legislatures, and of course all the articles of the treaty from 11 to 37, inclusive, became inoperative and void.

Besides, the lands were to be *set apart*—separated from the rest of the Choctaw and Chickasaw lands—for *friendly tribes*. In order to provide for tribal occupation by other tribes, it became necessary that the lands should be set apart—separated from the rest of the lands of the Choctaws and Chickasaws—and this establishes beyond controversy that only the Leased District was so "set apart" in compliance with the absolute requirement of the fifth stipulation, and that it is utterly impossible to find in the terms of the treaty of 1866, in reference to the lands east of 98°, any such compliance with this imperative and absolute requirement.

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